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January 12, 2007

Susan H. Kuhbach
Senior Office Director for Import Administration
U.S. Department of Commerce
Central Records Unit, Room 1870
Pennsylvania Avenue and 14th Street, N.W.
Washington, D.C. 20230

Re: Application of the Countervailing Duty Law to Imports from the People's Republic of China: Request for Comment

Dear Ms. Kuhbach:

On behalf of the Southern Shrimp Alliance (SSA), we submit the following comments on the applicability of the countervailing duty law to imports from the People's Republic of China (China) in response to the Department of Commerce's Request for Comment, 71 Fed. Reg. 75507 (December 15, 2006).

In Carbon Steel Wire Rod From Czechoslovakia, 49 Fed. Reg. 19730 (May 7, 1984) (final negative countervailing duty determination), and Carbon Steel Wire Rod From Poland, 49 Fed. Reg. 19734 (May 7, 1984) (final negative countervailing duty determination), the Department concluded that it could not identify subsidies in a non-market economy (NME) country. In those determinations, the Department explained the rationale for this conclusion as follows:

> We believe a subsidy (or bounty or grant) is definitionally any action that distorts or subverts the market process and results in a misallocation of resources, encouraging inefficient production and lessening world wealth.

> In NMEs, resources are not allocated by a market. With varying degrees of control, allocation is achieved by central planning. Without a market, it is obviously meaningless to look for a misallocation of resources caused by subsidies. There is no market process to distort or subvert. Resources may appear to be misallocated in an NME when compared to the standard of a market economy, but the resource misallocation results from central planning, not subsidies.
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> It is this fundamental distinction – that in an NME system the government does not interfere in the market process, but supplants it – that has led us to conclude that subsidies have no meaning outside the context of a market economy.

Carbon Steel Wire Rod From Czechoslovakia, 49 Fed. at 19731 (emphasis added); Carbon Steel Wire Rod From Poland, 49 Fed. Reg. at 19735 (emphasis added).

In Georgetown Steel v. United States, 801 Fed.2d 1308 (Fed.Cir. 1986), the U.S. Court of Appeals for the Federal Circuit upheld as reasonable this construction of the countervailing duty statute as it was then in effect. After noting that "Congress has not defined the terms 'bounty' and 'grant'" as used in the statute at that time, id. at 1314, the Federal Circuit held that it could not say that the Department's determination that benefits granted by NME governments were not bounties or grants "was unreasonable, not in accordance with law or an abuse of discretion." Id. at 1318 (citing Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)). Since that time, the Department has not imposed countervailing duties on imports from any NME country, including China.

While the reasoning adopted by the Department and upheld by the Federal Circuit may have been reasonable under a statutory scheme that lacked a clear definition of what constituted a subsidy, this is no longer the case. As a result of the enactment of the Uruguay Round Agreements Act, there is now an explicit definition of "subsidy" set forth in the statute. This new definition, consistent with the definition set forth in the WTO Agreement on Subsidies and Countervailing Measures, provides that a subsidy exists where (i) a government or public body

(ii) provides a financial contribution or any form of income or price support within the meaning of Article XVI of the GATT 1994, and (iii) a benefit is thereby conferred. See Section 771(5)(B) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677(5)(B). Nothing in this statutory definition limits its applicability to market economy countries.

Furthermore, this statutory definition, unlike the definition relied upon by the Department in the Wire Rod cases, is not tied in any way to a demonstration of the effects of the subsidy in a market. Indeed, the very next subparagraph in the current statute expressly provides that "{t}he administering authority is not required to consider the effect of the subsidy in determining whether a subsidy exists under this paragraph." Section 771(5)(C) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1677(5)(C). Accordingly, the reasoning that led the Department to conclude that subsidies could not be identified in an NME country – i.e., that subsidies are by definition actions that have the effect of distorting markets and that markets by definition do not exist in an NME country – is no longer dispositive of the question of the applicability of the countervailing duty law to China and other NME countries.

Indeed, given the current statutory definition, and the clear Congressional directive that the Department need not consider the effect of a governmental action to determine whether it constitutes a subsidy, there is strong rationale for the Department now to apply the counter-vailing duty law to NME countries such as China. Moreover, such a change in policy in light of the change in the statute should be upheld as reasonable by the courts if the Department provides a reasoned explanation for the change. It is well-established that the Department may change its policy, including as to a statutory interpretation, so long as the its departure from a prior policy is accompanied by a reasoned analysis. Allegheny Ludlum Corp. v. United States, 24 C.I.T. 452,

458 (Ct. Int'l Trade 2000); see also Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 42 (1983). As the Supreme Court has stated:

> This Court has rejected the argument that an agency's interpretation "is not entitled to deference because it represents a sharp break with prior interpretations" of the statute in question. * * * In Chevron, we held that a revised interpretation deserves deference because "[a]n initial agency interpretation is not instantly carved in stone" and "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." * * * An agency is not required to "'establish rules of conduct to last forever,'" * * * but rather "must be given ample latitude to 'adapt [its] rules and policies to the demands of changing circumstances.'"

Rust v. Sullivan, 500 U.S. 173, 186-87 (1991) (citations omitted).

Here, the change in the statutory definition of what constitutes a subsidy provides a clear justification for a change in the Department's policy. In addition, practical support for the conclusion that subsidies in China can now be recognized is contained in the documentation of China's accession to the WTO, as well as subsequent submissions by both China and the United States to the WTO on the subject of China's subsidies.

In its protocol of accession to the WTO, China committed to notify the WTO of "any subsidy within the meaning of Article 1 of the Agreement on Subsidies and Countervailing Measures." Protocol of Accession of the People's Republic of China, WT/L/432 (23 November 2001) at Article 10.1. Some such subsidy programs were listed in an annex to China's protocol of accession. Id. at Annex 5A. A significant number of additional subsidy programs have more recently been notified by China. People's Republic of China, New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the SCM Agreement, G/SCM/N/123/CHN (13 April 2006).

In addition, China agreed in its protocol of accession that "subsidies provided to state-owned enterprises will be viewed as specific if, inter alia, state-owned enterprises are the

predominant recipients of such subsidies or state-owned enterprises receive disproportionately large amounts of such subsidies." Protocol of Accession of the People's Republic of China at Article 10.2. China also agreed to eliminate all export and import substitution subsidy programs upon accession. Id. at Article 10.3.

In addition, Article 15 of China's protocol of accession, entitled "Price Comparability in Determining Subsidies and Dumping," provides that "Article VI of the GATT 1994, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement") and the SCM Agreement shall apply in proceedings involving imports of Chinese origin into a WTO Member." Id. at Article 15. Part (b) of Article 15 specifically provides that in countervailing duty actions against goods from China, benchmarks taken from outside China may under appropriate circumstances be used to identify and measure subsidy benefits. This provision was the result of the U.S.-China bilateral agreement leading up to China's accession to the WTO,[1] and demonstrates that the Office of the U.S. Trade Representative (USTR) has recognized the existence of subsidies in China, and indeed has taken steps to ensure that such subsidies can be measured for purposes of countervailing duty actions.

The 2006 USTR report on China's compliance with its WTO obligations details these special provisions:

> China also agreed to various special rules that apply when other WTO members seek to enforce the disciplines of the Subsidies Agreement against Chinese subsidies (either in individual WTO members' CVD proceedings or in WTO enforcement proceedings). Under these rules, in certain circumstances, WTO members can identify and measure Chinese subsidies using alternative methods in

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[1] See March 14, 2000 U.S.-China Bilateral Agreement at 4, found at http://www.insidetrade.com/secure/specials/world_china_us-china_agreement.asp.

> order to account for the special characteristics of China's economy. For example, in certain circumstances, when determining whether preferential government benefits have been provided to a Chinese enterprise via, e.g., a loan, WTO members can use foreign or other market-based criteria rather than Chinese benchmarks to ascertain the benefit of that loan and its terms. Special rules also govern the actionability of subsidies provided to state-owned enterprises.

Office of the U.S. Trade Representative, 2006 Report to Congress on China's WTO Compliance at 42 (December 11, 2006). The report then goes on to detail the aggressive efforts of the USTR to urge China to fully report and reform its subsidy practices in accordance with WTO rules and procedures:

> Following increasing pressure from the United States and other WTO members, China finally submitted its long-overdue subsidies notification to the WTO's Subsidies Committee in April 2006. Although the notification is lengthy, with over 70 subsidy programs reported, it is also notably incomplete, as it failed to notify any subsidies provided by China's state-owned banks or by provincial and local government authorities. In addition, while China notified several subsidies that appear to be prohibited, it did so without making any commitment to withdraw them, and it failed to notify other subsidies that appear to be prohibited. The United States has devoted significant time and resources to monitoring and analyzing China's subsidy practices, and these efforts helped to identify significant omissions in China's subsidy notification. In accordance with Subsidies Committee procedures, the United States submitted extensive written questions and comments on China's subsidies notification in July 2006, as did several other WTO Members, including the EC, Japan, Canada, Mexico, Australia and Turkey. China has not yet responded to those submissions. During the annual transitional review before the Subsidies Committee, held in October 2006, the United States reiterated its concerns about China's subsidies notifications and urged China to withdraw its prohibited subsidies immediately.
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> The United States began seeking changes to China's subsidies practices immediately after China submitted its subsidies notification in April 2006. Through a series of bilateral meetings in Beijing, including high-level meetings, the United States made clear that China needed to withdraw both the prohibited subsidies that it had notified and several additional prohibited subsidies that it had not notified. The subsidies at issue benefit a wide range of industries in China and include both export subsidies, which make it more difficult for U.S. manufacturers to compete against Chinese manufacturers in the U.S. market and third-country markets, and import substitution subsidies, which make it more

> difficult for U.S. manufacturers to export their products to China. To date, although the negotiations have made some progress, China has been unwilling to commit to the immediate withdrawal of the subsidies in question. The United States is continuing to press China on this issue and will take further actions seeking the withdrawal of these subsidies, including the initiation of WTO dispute settlement if appropriate.

Id. at 42-43.

Under such circumstances, it is appropriate that the Department change its policy and apply the countervailing duty law to imports from China, even while China remains an NME country for antidumping purposes.

Respectfully submitted,

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